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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,

No. 232.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

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The Metropolitan Press, Seattle.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

No. 282.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment begun by the defendant in error June 27, 1899, in the Superior Court of King County, State of Washington, alleging that it was seized

in fee and possessed and entitled to the possession of the north half of the southwest quarter, and the northwest quarter of the southeast quarter of section three, township twenty-five north, range four east of W. M., which land is of the value of twenty thousand dollars ($20,000); that on the 12th day of March, 1893, plaintiff in error ousted and ejected defendant in error therefrom and unlawfully retains possession thereof. (Record pages 1 and 2.)

Plaintiff in error by answer denies the allegations contained in the complaint of defendant in error (Record page 3.) The case comes on for trial and upon being heard, argued and submitted the trial court made and entered the following Findings of Fact and Conclusions of Law:

(Record, page 4.)

That the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east, is of the value of twenty thousand dollars and was selected by Phillip H. Lewis as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872.

2. March 13th, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently appealed to the commissioner of the General Land Office, and finally to the Secretary of the Interior, who on December 18th, 1895, decided adversely to Anton Johanson.

From the foregoing facts the court finds as Conclusions of Law:

1. That the plaintiff was on the 13th day of March, 1893, seized in fee, and possessed and entitled to the possession to, said north half of the southwest quarter and the northwest quarter of the southeast quarter section 3, township 25 north, range 4 east.

2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof.

To each of the foregoing Conclusions of Law defendant excepted, which exceptions were allowed.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that plaintiff have and recover of defendant the possession of the aforesaid premises, together with his costs, taxed at $————.

To each of the foregoing conclusions of law plaintiff in error excepted. (Record page 5.) From the final decree entered therein appeal was taken and presented by plaintiff in error to the Supreme Court of the State of Washington. (Record pages 5-7.)

On December 19, 1901, the State Supreme Court rendered its decision set forth in its opinion (Record pages 7 to 11) and on January 29th, 1902, entered its judgment. (Record page 12.)

The relator thereupon sued out a writ of error from this court. (Record pages 12 to 19.)

The decisions of the State Supreme Court were brought under review sustaining the judgment of the trial court in effect denies all the assignments of error presented to that court. Plaintiff in error conceives the questions arising in that case the same as those presented and distinctly contraverted in the trial court and the Supreme Court of the State of Washington.

This is an action wherein the facts of the case are not in controversy, it being the object of all the parties to this action to have the various facts bearing upon the title of the land in question construed by this court.

This court will find as all the courts before which this action has come, have found, *the plaintiff in error clothed with the possessory title of the land in question*, claiming

the same as his homestead under the Homestead Laws of the United States.

The defendant in error seeking to take from him his possessory title by setting up as a better title the fact that Phillip H. Lewis, as agent for King county, Washington Territory, filed a list of this and other lands designated as list No. 2 of indemnity school selections in the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872, which title plaintiff in error denies, asserting:

1st. That Phillip H. Lewis had no authority to select indemnity school lands under the act of March 2nd, 1853, and the act of February 26th, 1859, or either of them.

2nd. That the Territory of Washington was not entitled to select indemnity lieu school lands under the act of February 26th, 1859.

3rd. That even though said selection was regularly and legally made it merely created reservation of the land in question and passed no title to the defendant in error.

4th. That by the act of February 27th, 1889 (the Enabling Act), Congress carved out of such reserved lands the portions it desired to grant to the State of Washington, granted them to the state, and expressly excepted from the operation of the grant the lands in question, putting an

end to the purposes for the reservation, and returning the lands in question to their original status, that of unappropriated government lands of the United States.

SPECIFICATIONS RELIED UPON.

1st. The State Supreme Court erred in deciding that Phillip H. Lewis had authority to act as agent for King County, or Washington Territory, in selecting and filing list No. 2 of indemnity school selections in the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859.

2nd. The State Supreme Court erred in deciding that the Territory of Washington was entitled to select lands in lieu of deficiencies arising from natural causes under the act of Congress approved February 26th, 1859.

3rd. The State Supreme Court erred in deciding that the State of Washington was on the 13th day of March, 1893, seized in fee, and possessed and entitled to the possession of the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east.

4th. The State Supreme Court erred in deciding that on said 13th day of March, 1893, plaintiff in error unlawfully entered the north half of the southwest quarter

and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east.

ARGUMENT.

With reference to the first specification of error, Phillip H. Lewis assuming to act as agent for the county commissioners of King county, Washington Territory, selected the land in question under the acts of March 2, 1853, and February 26th, 1859, because parts of sections 16 and 36 of that township were fractional in quantity, a portion of each being occupied by Lake Washington. It is well settled "*that there can be no reservation of public lands except by some treaty, law or authorized act of the Executive Department.* (See *Woolsey vs. Chapman,* 101 U. S. 755; *U. S. vs. Fitzgerald,* 15 Peters, 407; also sections 2257 and 2258 R. S.) There is no act of Congress or of the Territory of Washington making Phillip H. Lewis agent or representative in any capacity of the United States government of the Territory of Washington, or even of King county, Washington. We therefore think it fair to assume that his act was unauthorized, hence the land in question could not by his act be legally reserved.

A consideration of the second specification of error requires somewhat of a review of the growth and policy of the government with reference to the reserving and granting of lands to the states for school purposes. The earlier colonial states had no grants for school purposes

at all. In later years Congress got to making definite grants to the states as they were taken into the Union. Finally it became the custom to grant to each state as it was admitted into the Union section 16 of each township for school purposes, and still later section 36 was included. Then finally, as the rights of settlers upon unsurveyed lands began to be recognized the government began to provide that where settlers in new territories located upon either sections 16 or 36 prior to survey, that the settlers might have the land so occupied, and selections of lieu lands might be made to take the place of such parts of sections 16 and 36 as should thus be taken up by settlers. The benevolence of Congress had grown to this point when the Territory of Washington was created and the act of Congress approved March 2, 1853, was passed. Act March 2, 1853 (10 Statutes, 179, Sec. 20, Sec. 1947, R. S.)

"Sections numbered sixteen and thirty-six in each township of Washington Territory shall be reserved for the purpose of being applied to common schools in that territory. In all cases where sections sixteen and thirty-six, or either or any of them, are occupied by actual settlers prior to the survey thereof, the County Commissioners of the counties in which such sections so occupied are situated, are authorized to locate other lands, to an equal amount, in sections or fractional sections, as the case may be, within their respective counties, in lieu of the sections so occupied."

This act contemplates that the county commissioners of each county shall act for someone in the matter of selecting these lieu lands. In as much as the Territory of Washington passed no acts with reference to the selection thereof and did nothing that recognized the county commissioners as its representatives for that purpose, and in as much as the reservation could only be made by the United States, we think the only logical conclusion that can be reached is that the act of 1853 made the county commissioners agents for the United States for the purpose of making the selections as specified in that act.

The act of 1853 was an act applicable to Washington Territory only. Three years later Congress extended to the balance of the states and territories where sections 16 and 36 had been granted or reserved for school purposes the same right; that of allowing settlers to settle upon sections 16 and 36 prior to their survey and acquire such lands, and allowing the selection of lieu lands to supply the deficiencies caused by such settlement. At this time Congress seems to have still been impelled by impulses of generosity and went a step further, allowing selections of lieu lands where sections 16 and 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatsoever.

Act of February 26, 1859 (11 Stat. 385).

An act to authorize settlers upon sixteen and thirty-six

sections, who settled before the surveys of the public lands, to present their settlements:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where settlements, with a view to pre-emption, have been made before the survey of the lands in the fields which shall be found to have been made on sections sixteen or thirty-six, said section shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors; and other lands are hereby also appropriated to compensate deficiencies for school purposes where said sections sixteen and thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever; *provided*, that the lands by this section appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May twentieth, eighteen hundred and twenty-six, entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for."

This act provides that the selections made under its terms shall be made in accordance with the principles of

adjustment and the provisions of the act of Congress of May 20th, 1826. Section 2 of the act of Congress approved May 20th, 1826, 4 Statutes, 179, is as follows:

Sec. 2. "And be it further enacted, that the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township for which any tract is selected, may be situated; and when so selected, shall be held by the same tenure, and upon the same terms for the support of schools in such township, as section number sixteen is, or may be held, in the state where such township shall be situated."

At the time of the passage of this act the Secretary of the Treasury had in his control the affairs of the public land system. Congress by this act recognizes the executive department as the proper officer to make the reservations of lands of this character; and, again, the act of 1859 recognizes the executive department as the proper officer to make the selection and emphasizes that recognition by taking it out of what would seem to be the natural department for the selection, that is, the Department of the Interior, and providing that the selection shall be made by the Secretary of the Treasury, the Interior Department having been created some ten years prior. (See act of March 3, 1849, 9 Statutes, page 395.)

The act of February 26th, 1859, as carried into the Revised Statutes, is silent upon the question of whom shall make the selection. (See sections 2275 and 2276 of the

Revised Statutes.) From the foregoing acts we can see no escape from the following conclusions:

1st. That when Congress passed the act of 1859 it intended any selections of lieu lands made thereunder should be made by an executive officer of the United States.

2nd. That it intended that such selection should be made by a particular executive officer, to-wit, that is: the Secretary of the Treasury.

3rd. Washington having been provided for by a special act of Congress, that of March 2, 1853, Congress did not intend that the act of 1859 should apply to her, hence there was no authority to make a selection under the act of February 26, 1859, of the land in question.

That act, or special law for Washington, was kept separate and carried into the Revised Statutes as section 1947, and so allowed to stand as a special law, applicable only to Washington Territory, at the same time the general act of February 26, 1859, and the act of May 20, 1826, were carried into the Revised Statutes as sections 2275 and 2276. These sections provided for all the other territories what the special act of March 2, 1853, had provided for Washington, except a difference in the provision of the two acts as to the mode and manner of the selection, and also that the act of February 26, 1859, went further and al-

lowed indemnity for the deficiencies arising from natural causes, and limited the amount that might be selected in a township of a certain size. It appears that the compilers of the Revised Statutes could not conclude that the act of February 26, 1859, embodied all the features of the act of March 2, 1853, which provided that the County Commissioners should make selections in lieu of such as were occupied within their respective counties, when the act of February 26, 1859, provided that lands should be selected by the Secretary of the Treasury, within the same land district, and in accordance with the following principles of adjustment, etc., limiting the amount that might be selected in a township, and therefore rightly concluded, in as much as repeals of statutes by implication are not favored, to carry it into the statute as a separate special statute (Section 1947, R. S.). See *Chew Heong vs. United States*, 112 U. S. 536. In the case of *State vs. Stoll*, 17 Wallace, 425, and *Ex parte Crow Dog*, 109, U. S. 556, the Supreme Court lays down this rule, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is some necessary inconsistency in the two acts standing together. The reason assigned for this rule by Wood, V. C., in *Fitzgerald vs. Champenys*, (30 L. J. N. S. Eq. 782), and 2 *Johns* and *Hem.* 31-34.

"That the Legislature having had its attention directed to a special subject, and having observed all the circum-

stances of the case, and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

Which reason for the rule is a sound one. Of course, it would be impossible for the court to reconcile and construe the acts of March 2, 1853, and February 26, 1859, so as to make them both apply to the same state; for one provides that certain selections shall be made by the County Commissioners, while the other provides that the same selection, together with certain other selections, shall be made by the Secretary of the Treasury, and if we apply the rule laid down by the Supreme Court, to-wit: ,

"That a general act is not to be construed as a repeal of a previous act, unless there is some express reference to the previous legislation of the subject."

It will be impossible to arrive at any conclusion in the absence of further definite and positive legislation on the subject than that the act of March 2, 1853, would have to stand as a special act applicable only to Washington Territory, and any question that may have existed as to whether or not the act of February 26, 1859, repealed the act of March 2, 1853, seems to be settled beyond question. by the acts being carried into the Revised Statutes, as sections 1947, 2275 and 2276. (See section 5596, R. S.)

The third specification of error, to-wit: "That the State Supreme Court erred in deciding that the State of Wash-

ington was on the 13th day of March, 1893, seized in fee and possessed and entitled to the possession of the north half of the southwest quarter and the northwest quarter of the southeast quarter of section three, township twenty-five north, range four east," is the one most strongly relied upon by plaintiff in error. Assuming that the selection of the land in question was duly authorized and legally made, then the State's title consists of a selection made in territorial days under the act of Congress passed March 2nd, 1853. (10 Statutes, page 179, Sec. 1947 Revised Statutes; and the act of February 26, 1859; 11 Statutes, page 285; Sec. 2275 Revised Statutes.) All that the act of 1853 did with reference to sections 16 and 36 was to reserve them for the purpose of applying them to common schools. Lieu lands selected to supply deficiencies in these sections would, of course, be held for the same purpose and by no greater title. Therefore, up to the time of the passage of the Enabling Act we have the United States reserving sections 16 and 36 and the land in controversy, together with other lands, for the express purpose of granting the lands for common school purposes.

Hugh Barkley vs. The United States, 3 Wash. Ter. page 522.

Where the court in passing upon the question of whether the United States or the Territory of Washington had control over lands reserved under the act of March 2, 1853, says:

"The government has, for a wise purpose, set apart and reserved these lands from the general domain, and announced the purpose to which they will be devoted. It retains control and dominion over them until the happening of a certain event, it is somewhat as a trustee of an expressed trust. It also retains the right, up to a certain time, to annul the act by which such sections were reserved, and might, within that limit, annul the former act, and throw these lands open as public lands. *This reserved right in the Government must give it control over these lands as absolute as that of any owner could be.*"

United States vs. Elliott, 41 Pac. p. 720; 12 Utah, p. 119.

Where the Supreme Court of Utah in passing upon the same question, quotes the case above cited with approval and reversing its former decision, says:

"The truth is, a reservation can never be said, in the sense of law, to vest a title in the reservee, where there was formerly no right or title existing in such reservee. There is nowhere, in any of the statutes making such reservation, any intimation that the Congress of the United States intended that such reserved lands should pass out from under the dominion and control of the Government; and in the Enabling Act passed for the benefit of the people of this territory, Congress has granted such lands to the State to be formed out of the territory, thus clearly showing that at no time has Congress understood the mere reservation of the lands for school purposes to be equivalent to a conveyance of the same to the people of the territory."

When the State of Washington was admitted into the Union, Congress again showed that it understood these

lands to be in a mere state of reservation, for by section 10 of the act of February 22, 1889 (the Enabling Act), it remembered its promise to grant the state school lands, which grant it made in the following language:

"That upon the admission of each of said states into the Union, sections number 16 and 36 in every township of said proposed states, and where such sections, or any part thereof, have been sold or otherwise disposed of, by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivision of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior," etc., etc.

Congress took from this reservation of sections 16 and 36 and other lands, including the land in question, and made a grant to the state of sections 16 and 36 in terms that are plain and unmistakable, and in equally plain terms granted to the state lieu lands thereafter to be selected "in such manner as the legislature may provide, with the approval of the Secretary of the Interior."

It is to be noted at this point that the lieu land granted by the Enabling Act covers only a portion of the deficiency for which the selections were made under the acts of 1853 and 1859. In other words, the Enabling Act granted to the state lieu lands, "where such sections, or any part thereof, have been sold or otherwise disposed of by or

under the authority of any act of Congress," which would include lands settled upon prior to survey; but not lieu lands where sections 16 and 36 are fractional by reason of natural causes.

Congress plainly recognized there might be some uncertainty as to the disposition it intended to make of reserved lands (such as the land in question) which were not included in the grants contained in the Enabling Act. To make its intention plain it wound up the various grants in the following language, which forms a part of the last paragraph of section 17 of the Enabling Act:

"That the states provided for in this act shall not be entitled to any further or other grants of land, for any purpose than as expressly provided in this act."

This language is so clear and expressive as to leave no room for argument as to its meaning. It cannot even be argued that it does not apply to all the grants, for the sentence refers to the "Act," and "further and other grants," and to make it still plainer, the next sentence, which forms the balance of the paragraph, expressly refers to the section of which it is a part.

Congress, by the Enabling Act, not only took from this reservation of school lands a portion of the reserved land and granted it to the state, and said the state should not have any more lands for that purpose, but it repealed the acts of 1853 and 1859. Section 25 of the Enabling Act

provides, "that all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories, or by Congress, are hereby repealed."

The last part of section 11, of the Enabling Act, which refers to school lands, provides:

"And such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or *unsurveyed;* but shall be reserved for school purposes only."

While both the acts of 1853 and 1859 provide that settlements may be made upon sections 16 and 36 prior to survey thereof, and the entry perfected.

Again, the act of 1853 made no reservation of mineral lands, while the Enabling Act reserved mineral lands. With such direct conflict the acts of 1853 and 1859 cannot stand.

The State of Washington has recognized its right to lieu lands under the terms of section 10 of the Enabling Act.

See laws of Washington for 1889 and 1890, p. 286.
See laws of Washington for 1891, page 399.

For the interpretation of Congress for a similar act, see acts with reference to State University Lands.

Act of July 17, 1854. (10 U. S. St. at Large, 305.)

Act of March 14, 1864. (13 U. S. St. at Large, 28.)

See also section 14, act of February 22, 1889 (Enabling Act), where Congress provides that the land confirmed in the grantees of the territory shall be included in making up the state's quota for university purposes.

It is a significant fact that there were never any acts of the legislature of the Territory of Washington with reference to these lands showing that the territory appreciated the fact that it had nothing to do with the lands, no interest or title in them, until after the passage of the Enabling Act. They had been taught the effect of these acts and the status of these lands by their experience with state university lands which were held in a state of reservation under a similar act where the territory authorities attempted to make use of what they conceived to be their title to the lands.

An examination of the acts and decisions bearing upon the university lands of Washington will show plainly that the courts and Congress itself has placed a construction upon land grants almost identically the same as the school land grants, which is the same as plaintiff in error now seeks to have placed upon the grants applicable to the land in question. The university lands of Washington were selected under section 4 of the act of Congress approved July 17, 1854. (See 10 St. at Large, 305.)

"Sec. 4. And be it further enacted that in lieu of the two townships of land granted to the Territory of Oregon by the 10th section of the act of 1850, for universities, there shall be reserved to each of the territories of Washington and Oregon two townships of land of 36 sections each, to be selected in subdivisions, for university purposes, under the direction of the legislature of said territories, respectively."

Under the foregoing act the Board of Commissioners selected the university lands for the territory of Washington, and thereafter undertook to sell and convey the same, executing deeds therefor. When it came to be recognized that the act of September 27th, 1854, authorizing the selection of the university lands, merely reserved them for the purpose of granting at some subsequent date, and that the Territory of Washington in fact had no title to the lands which it could convey. Congress passed the act of March 14, 1864 (13 St. at Large, page 28), wherein, after reciting the previous act, Congress says:

"Whereas, it has been represented that sales have been made by territorial authorities of lands selected by virtue of the terms of said act of the 17th of July, 1854, authorizing selections to be *reserved* merely, under the conviction that they had power to dispose of the same as a fee simple grant; therefore,

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That in all cases of sales made to individuals by the territorial authorities prior to the passage of this act, in which it may be shown to the satisfaction of the Secretary of the Interior that such sales were bona fide and of the class

hereinbefore mentioned, and that the tracts so held are selections in all other respects regular and proper, it shall and may be lawful for the secretary to approve such selections as a grant in fee simple, and a transcript certified under the seal of the general land office by the commissioner thereof of such approval shall vest the title in the territory and its bona fide vendees."

This act clearly shows that Congress intended no title to pass to the Territory of Washington where it directed the selection of the land for the purpose of reserving them either for school or university uses. Following this, in the year of 1875, the legislature of the Territory of Washington passed an act, approved October 26, 1875, page 103 of the laws of Washington Territory of 1875, reciting substantially all that had occurred declaring by its enactment that all such deeds were valid and carried to the respective purchasers, "their heirs, executors and assigns all the right, title and interest therein vested or which may thereafter be vested in the Territory of Washington to the lands described in said deeds."

For a full discussion of the acts with reference to these university lands see *Keane vs. Braygger*, 28 Pacific, 653; 3 Wash. State, 338.

The act of February 22, 1889, gave the state the right to make indemnity selections subject to the approval of the Secretary of the Interior, and no reference is made to the selections that include the lands in question, which were made in territorial days, other than the general one where-

in Congress asserted that the state should have no other or further lands for that purpose except as in that act provided. The same act also goes further and provides that the state shall waive any right it may have to all land not appropriated.

See section 4 of the act of February 22, 1889, wherein Congress provides that as a condition of admission into the Union the constitutional convention should provide "by ordinance, irrevokable without the consent of the United States and the people of said states," etc., etc.

2nd. That the people inhabiting said proposed states to acknowledge and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof."

The first legislature of the state recognized the binding effect of this compact and the repealing effect of the act of 1889 when it enacted section 3 of "An act to provide for the selection of indemnity lands for the support of common schools in lieu of sections 16 and 36, or any parts thereof, that have been sold or otherwise disposed of by or under the authority of any act of Congress and declaring an emergency;" approved March 26, 1890, as follows:

"Sec. 3. With the least practicable delay after organization the Board of Commissioners herein provided for shall proceed to segregate lands for the support of common schools, in lieu of sections 16 and 36, or any parts thereof, of every township of the state that have been sold

or otherwise disposed of by or under the authority of any act of Congress, and when such segregation is completed the Board of Commissioners shall report the fact to the Secretary of the Interior and request his approval of the selections made; *Provided,* That the selections shall be made in conformity with the provisions of sections ten and nineteen of the act of Congress enabling the states of North and South Dakota, Montana and Washington to be admitted into the Union."

This act is a plain admission by the state that it had no claim to indemnity for losses occurring in sections 16 and 36 from natural causes; and an equally plain admission that it had no claim to the indemnity lands located by the county commissioners.

The deficient section as indemnity for which this tract was located has been granted to the state. The indemnity selection was either granted at the same time, or was released from reserve. There is no provision of law for continuing the indemnity reserve after the deficient section was granted, the reserve being made "in contemplation of a future grant." Congress may have intended to permit the county commissioners to set apart this tract to fill out the amount of reserved acreage in the deficient reserved section, but both the deficient section and the indemnity remained within the control and "powers of disposition of Congress" until the land was actually granted, and if the deficient section was granted and nothing said about this tract set apart as indemnity by the

county commissioners, this tract was not granted, and not reserved for any future grant.

In the case of *Clements vs. Warner,* 24 How. 394, the Supreme Court said:

"The policy of the federal government in favor of settlers has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In *Shepley vs. Cowan,* 91 U. S. 330, the court said:

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the Commons of Carondelet."

In *Aurrecoechea vs. Bangs,* 114 U. S. 381, the court said:

"In the case before us the pre-emptor was the first, after the land ceased to be a part of the Mexican claim and was restored to the public domain, to make application to the land office and assert his right to appropriate it as public land. The officers of the department recognized his claim, as we think they were bound to do, for the land had only a few days before this become public land, and thus liable to pre-emption or the valid selection of the state. The invalid selection, made at a time when the land was not subject to a selection, was not made good by the act of 1866, which expressly excluded it; and while we held that after the land became public land and liable to

selection, the former selection might be held good, its *validity* could not relate to the time of its assertion in the land office after it became so liable. But if, before the latter proceeding was had, *or notice to the land office of an intention to rely on the old section was given,* other rights had intervened, the state right of selection could not be made to the prejudice of those of others."

Another point to which we desire to direct the court's attention is that the special act of March 2, 1853, reserving school lands for Washington Territory provided for the selection of lieu lands where any part of sections 16 or 36 were lost by reason of settlement thereon prior to survey. The act of February 26, 1859, carried to all the other states and territories the right to select lieu lands to supply deficiencies arising in sections 16 and 36 by reason of settlement thereon prior to survey; also the right to select in lieu of deficiencies arising from natural causes, such as sections 16 or 36 being under water.

The act of February 22, 1889, carried to the State of Washington the right to select in lieu of any deficiencies arising in sections 16 or 36 "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress." This right to indemnity or lieu lands as carried to the state by the Enabling Act (of February 22, 1889) would include any lands lost by settlement upon sections 16 and 36 as provided in both the acts of 1853 and 1859, but it does not carry to the state the right to lieu lands by reason of

sections 16 or 36 being fractional in quantity, or "where either one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

Assuming that the act of 1859 applied to the State of Washington, then we contend that Congress wisely receded from its expressed intention of giving the state lieu school lands, because of fractional townships, as there are many fractional townships, especially in the vicinity of the Puget Sound country, where the fraction of the township remaining amounts to little if any more than two sections, and had Congress applied any such rule of donating its lands to the state for school purposes, there might have been townships where all or nearly all of the land in the township might have been applied to that purpose. It cannot be urged that there was ever a grant of lands to the State of Washington for school purposes until the passage of the act of February 22, 1889. Therefore, in order for the state to acquire a valid title to lieu or indemnity school lands, it must comply substantially with the terms of that act. The act itself provides that the land shall be selected "in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken are hereby granted to said states for the support of common schools; *such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior.* Again, such lieu lands

must be taken only "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress." The defendant in error does not claim the land in question was ever selected in the manner provided by the legislature of the State of Washington or that any such selection ever had the approval of the Secretary of the Interior, nor can it claim that the land in question was selected in lieu of the loss of any part of sections 16 or 36 by or under the authority of any act of Congress.

With reference to the fourth specification of error, it is practically disposed of by the court's ruling upon the third, as the land either belongs to the State of Washington or is public land of the United States subject to the homestead entry of plaintiff in error, there being no question as to his homestead right, or his compliance so far as he has been permitted to, with the homestead laws.

The defendant in error having failed to show any title to the land in question, its action must fail and the decree of the Supreme Court of the State of Washington should be reversed, with instructions to enter a decree in favor of plaintiff in error.

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